

Application Serial No. 10/669,238
Reply to Office Action dated July 12, 2007

REMARKS/ARGUMENTS

This filing represents the first response to a new non-final Office Action issued after the prosecution for this application was re-opened following a change in the rejection presented in the Final Office Action in the Examiner's Answer. Apparently, the Examiner has now completely abandoned the rejection which she was willing to proceed to appeal on and has instituted an entirely new grounds of rejection. Therefore, currently, claims 1-48 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,149,965 to van Lengerich et al. in view of U.S. Patent No. 6,242,033 to Sander. For at least the reasons set forth below, it is respectfully submitted that the Examiner has failed to set forth a prima facie case of obviousness for these claims.

The Examiner admits that van Lengerich et al. does not teach adding protein in the amount or type of protein claimed, the particle size of the cereal bran as claimed, the thickness of the flakes as claimed, the carboxymethyl cellulose fiber as claimed or the high potency sweetener as claimed. Instead the Examiner recognizes that van Lengerich et al. is basically only concerned with a cereal product which has a high soluble fiber content supplied by inulin. However, the Examiner notes that Sander discloses a high protein cereal and essentially argues that it would have been obvious to one of ordinary skill in the art to add high levels of protein to the van Lengerich et al. cereal as taught by Sander to make a combination high soluble fiber and high protein cereal. Thus, having found references that teach some of the individual ingredients presented in the claims, the Examiner holds that it would have been obvious to one of ordinary skill in the art to combine those ingredients to make the specifically claimed cereal product. The Examiner then takes the further position, without any suggestion in the art, that the specified ranges and ratios are all obvious. It is submitted that these rejections are clearly erroneous for at least the reasons set forth below.

In combining Sander with van Lengerich et al., the Examiner simply states that it would have been obvious to one skilled in the art to add protein to the van Lengerich et al. cereal as taught by Sander to make a high protein cereal to enhance the nutritional

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profile of the product. The Examiner goes on to state that "the proper amount can readily be determined through routine experimentation to obtain the most optimum product with respect to taste and nutrition." See page 3 of the Office Action. Essentially, the Examiner is making an "obvious to try" argument. However, when the prior art discloses a broad selection of compounds rather than identifying predictable solutions, there is no basis for an "obvious to try" argument. *Takeda Chemical v. Alphapharm*, No. 06-1329 (Fed. Circ., June 28, 2007). Instead, the Examiner must show that there are a finite number of identified, predictable solutions, such that a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. *KSR International Co. v. Teleflex Inc.*, 127 U.S.1727, 1732 (2007). In the present case, there is no finite number of identified, predictable solutions. Instead, it would appear to the Applicant that a near infinite number of potential solutions would exist such the rejection presented by the Examiner should fail.

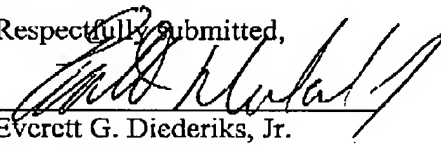
In the food arts, there is a broad selection of compounds, or ingredients, to choose from. However, the mere existence or use of an ingredient in one reference does not make it obvious to combine with any other ingredient in another reference. In the food arts, complex chemical interactions may take place during processing or cooking which give a final product certain characteristics. In fact, the Applicant's own specification specifically points out that adding protein and fiber to RTE cereals creates challenges because the amount of starchy constituent in the cereal is necessarily decreased in direct proportion to the increase in protein and fiber. Therefore, although the Examiner appears to see such addition of ingredients as merely adding two elements which will maintain their original structure and function, this is not the case. Additionally, van Lengerich et al. clearly sets forth typical problems associated with high fiber cereals, including dryness and high fragility. See column 1, lines 29-36 of van Lengerich et al. Furthermore, if anything, Sanders teaches away from the present invention by actually providing high protein in combination with low fiber. Specifically, the highest amount of dietary fiber present in any of the examples in Sander is 8.7% as set forth in Example 4. Therefore, one of ordinary skill in the art would not look to Sander to teach making a high fiber/high protein cereal product. Instead, Sander would actually suggest minimising the fiber

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content in a high protein cereal product. Finally, it should also be noted that van Lengerich et al. does not mention the desire for any protein at all. Thus, the Applicant respectfully submits that there does not exist any teaching or suggestion in the art to combine the known ingredients in the manner specifically claimed, the combined results would not be predictable and the references teach away from any such combination. To this end, the Examiner has not satisfied her burden of establishing a prima facie case of obviousness. In addition, merely stating that all the specifically claimed limitations regarding, for example, particle size, flake thickness, sweetener type and the like, are obvious constitutes nothing more than conclusory statements. As required for a proper prima facie case, there must be some specifically articulated reasoning, along with rational underpinning, to support the legal conclusion of obviousness. *KSR International Co. v. Teleflex Inc.*, *supra*. Therefore, if the Examiner plans to continue along this line of rejection, it is respectfully requested that each and every limitation in the claims be specifically and individually addressed, with the proper showing or teaching, coupled with direct reasoning and support, for any conclusions of obviousness.

Based on the above, it is requested that the prior art rejections be withdrawn the claims allowed and the application passed to issue. If the Examiner should have any additional concerns regarding the allowance of the application that can be readily addressed, she is cordially invited to contact the undersigned at the number provided below in order to further expedite prosecution.

Respectfully Submitted,


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